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Martin v. PGA Tour: A Misapplication of the Americans with Disabilities Act;Note

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Martin v. PGA Tour:[1] A Misapplication of the Americans with Disabilities Act

> I do not choose to be a common man. It is my right to be uncommon — if I can. I seek opportunity — not security. I do not wish to be a kept citizen, humbled and dulled by having the state look after me. I want to take the calculated risk; to dream and to build, to fail and to succeed. I refuse to barter incentive for a dole . . . . It is my heritage to stand erect, proud and unafraid; to think and act for myself, enjoy the benefit of my creations and to face the world boldly and say, this I have done. For our disabled millions, for you and me, all this is what it means to be an American.[2]

I. Introduction

In 1998, the Americans with Disabilities Act[3] ("ADA") added a new chapter in its brief but richly controversial history when Casey Martin, an aspiring professional golfer, brought suit against the PGA Tour to allow him to use a cart in traveling from shot to shot during his rounds of play.[4] Martin's claim quickly elicited debate, less within the United States legal community as it did within American society. More so than other ADA cases, Martin's claim seemed to challenge core American values, particularly whether the rules of a professional sport should be altered in order to accommodate the needs of a disabled competitor.

Perhaps because sports serve as a convenient lens through which we perceive the outside world, Martin's case served for many Americans as the watershed act in a growing trend towards the favoritism of certain classes of citizens. For some, Martin was a modern day Horatio Alger, a young man who was not letting his disability obstruct him from achieving a dream for many weekend golf hackers – a life on the PGA Tour. For others, his case personified the fears of many Americans – that in attempting to "level the playing field," courts often mistake the purpose for which the field was designed. According to a writer who is disabled himself, "Whatever [Martin] accomplishes as a player he'll always have an asterisk by his name. He won't have the satisfaction of knowing that despite his handicap he beat men who are better physically while playing by their rules, not his."[5] Another writer[6] compared the importance of Martin's claim in athletics to the constitutional issues addressed in *Marbury v. Madison*,[7] *Roe v. Wade*,[8] and *Brown v. Board of Education*.[9]

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1. Martin v. PGA Tour, 984 F. Supp. 1320 (D. Or. 1998) (regarding both parties' motions for summary judgment); Martin v. PGA Tour, 994 F. Supp. 1242 (D. Or. 1998) (concerning the court's final determination).

2. Lowell P. Weicker, Jr., *Historical Background of the Americans with Disabilities Act*, 64 TEMP. L. REV. 387, 392 (1991) (quoting Dr. Henry Viscardi).

3. Equal Opportunity for Individuals with Disabilities (Americans with Disabilities) Act, 42 U.S.C. §§ 12101 – 12213 (1994).

4. Martin v. PGA Tour, 994 F. Supp. 1242 (D. Or. 1998) (concerning the court's final determination).

5. Jerry Potter, *Martin's Accomplishments Will Always Have Asterisk*, USA TODAY, Feb. 12, 1998 at 6C.

6. Terence Moore, *Ruling Allowing Martin to use Cart Disregards the Essence of Golf*, ATLANTA J. & CONST., Feb. 13, 1998, at 3E.

7. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

8. Roe v. Wade, 410 U.S. 113 (1973).

While the Oregon District Court's two rulings in *Martin v. PGA Tour*[10] will not likely have as great an impact on American jurisprudence as the aforementioned cases, the decisions did provide an important interpretation of the ADA. By recognizing that ADA guidelines apply to professional athletic fields, the magistrate in *Martin* broadened the scope of the ADA's reach. In rendering this landmark conclusion, which is now under appeal by the Ninth Circuit, the magistrate rejected the notion espoused by the PGA that the ADA has zones of application (i.e. that operators of public facilities have the capacity to create private enclaves that are exempt from the direction of the ADA). Thus, the district court opened the door to possible future ADA claims by individuals who experience alleged discrimination on the actual playing field of professional sports.

This Note will examine the *Martin* case in light of its impact on the ADA, as well as judicial trends in ADA interpretation. In order to understand the context of these arguments, it will first explore the ADA – its history and text. This Note will then briefly discuss the two 1998 rulings that comprise the *Martin* decision. Next, this Note will analyze why the magistrate's holding in *Martin* was misguided, particularly in light of three cases which held that sports organizations are not covered under the ADA umbrella. This Note will close with an examination of how the *Martin* decisions may thwart the ADA's chief objectives.

II. History of the ADA

A. Efforts Prior to the ADA

Concern over the rights of people with disabilities first surfaced in Congress in 1948 when Congress enacted a measure to assist veterans who had been disabled during World War II.[11] The Act of June 10, 1948 prohibited employment discrimination based on physical handicaps within the United States Civil Service.[12] Twenty years later, Congress passed the Architectural Barriers Act of 1968, which required buildings constructed, altered, or financed by the federal government to be accessible to those with disabilities.[13]

Building upon these initial measures, in 1973 Congress passed the Rehabilitation Act,[14] an ambitious piece of legislation that would later serve as the model for the ADA. At the heart of the Rehabilitation Act of 1973 were provisions prohibiting discrimination against disabled individuals by federal contractors, recipients of federal grants, and participants in federal programs. While the Rehabilitation Act of 1973 served as a check against discrimination, it was also proactive in guaranteeing opportunities within the federal government for those with disabilities. For example, one section of the Rehabilitation Act required federal agencies to develop and update annually affirmative action plans for the hiring, placement, and advancement of individuals with disabilities.[15] The Rehabilitation Act also extended some vocational rehabilitation programs that had been highly successful in the past.

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9. Brown v. Board of Education, 347 U.S. 483 (1954).

10. Martin v. PGA Tour, 984 F. Supp. 1320 (D. Or. 1998) (regarding both parties' motions for summary judgment); Martin v. PGA Tour, 994 F. Supp. 1242 (D. Or. 1998) (concerning the court's final determination).

11. Act of June 10, 1948, Pub. L. No. 617, ch. 434, 62 Stat. 351.

12. *Id.*

13. Act of Aug. 12, 1968, Pub. L. No. 90-480, § 1, 82 Stat. 718 (codified as amended in 42 U.S.C. §§ 4151-4157 (1988)).

14. The Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (codified as amended throughout 29 U.S.C. (1994)).

15. 29 U.S.C. § 791 (1994).

A notion that was pivotal to the Rehabilitation Act, and later to the ADA, was that employers were subject to a duty of nondiscrimination, and thus, had to make reasonable accommodations for those with disabilities. An inherent problem, though, was that "reasonable accommodation" was never defined in the Rehabilitation Act of 1973. Programs or activities that were subject to the Act had no guidelines or statutory definition with which to work. The Supreme Court offered little help to employers in *Southeastern Community College v. Davis*,[16] stating that accommodations were reasonable unless they "constitute[d] an unauthorized extension of the obligations imposed."[17] As a result, the Rehabilitation Act was severely weakened and those with disabilities often found themselves in a position no better than had no legislation been passed.

Despite the lack of statutory direction in the Rehabilitation Act of 1973, the courts began formulating a consensus of what constituted "reasonable accommodation." In *Stutts v. Freeman*,[18] a dyslexic applicant to an apprenticeship program was denied admission after the employer attempted to make accommodations by giving a nonwritten exam and obtaining results from other forms of testing. The Court, however, held that when an employer "uses a test which cannot and does not accurately reflect the abilities of a handicapped person, as a matter of law [it] must do more to accommodate that individual."[19] The same year, in *Nelson v. Thornburgh*,[20] the court applied internal Department of Health and Human Services regulations in deciding that due to the defendant's large budget, as well as the modest cost and ease with which such accommodations could be adopted, the defendant had to provide half-time readers for the plaintiff.

While the courts were in the process of interpreting some of the more ambiguous provisions of the Rehabilitation Act, Congress continued to build on earlier efforts to accommodate its disabled citizens. In 1975, Congress passed the Education for All Handicapped Children Act,[21] which guaranteed handicapped children equal access to a free and adequate education. That same year Congress expanded the rights and programs available to citizens with developmental disabilities through the Developmentally Disabled Assistance and Bill of Rights Act.[22] In the 1980s, Congress went even further, enacting six major bills which expanded the civil rights of those with disabilities: the Voting Accessibility for the Elderly and Handicapped Act;[23] the Air Carrier Access Act of 1986;[24] the Handicapped Children's Protection Act of 1986;[25] the Protection and Advocacy for Mentally Ill Individuals Act of 1986;[26] the Civil Rights Restoration Act of 1987;[27] and the Fair Housing Amendments Act of 1988.[28]

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16. Southeastern Community College v. Davis, 442 U.S. 397 (1979).
17. *Id.* at 410.
18. Stutts v. Freeman, 694 F.2d 666 (11th Cir. 1983).
19. *Id.* at 669.
20. Nelson v. Thornburgh, 567 F. Supp. 369 (E.D. Pa. 1983), aff'd mem., 732 F.2d 146 (3rd Cir. 1984).
21. Pub. L. No. 94-142, 89 Stat. 773 (1975) (codified as amended at 20 U.S.C. §§ 1232, 1401, 1405-1420, 1453 (1988)).
22. Pub. L. No. 94-103, 89 Stat. 486 (1975) (codified as amended at 42 U.S.C. § 6001 (1988)).
23. Pub. L. No. 98-435, 98 Stat. 1678 (1984) (codified as amended at 42 U.S.C. § 1973 (1988)).
24. Pub. L. No. 99-435, 100 Stat. 1080 (1986) (codified as amended at 49 U.S.C. app. § 1374(c) (1988)).
25. Pub. L. No. 99-372, 100 Stat. 796 (1986) (codified as amended at 20 U.S.C. § 1415(e)(4)(B)-(G) (1988)).
26. Pub. L. No. 99-319, 100 Stat. 478 (1986) (codified as amended at 42 U.S.C. 10801 (1988)).
27. Pub. L. No. 100-259, 102 Stat. 28 (1988) (codified at 20 U.S.C. § 1681 (1988)).
28. Pub. L. No. 100-430, 102 Stat. 1619 (1988) (codified at 28 U.S.C. §§ 2341, 2342 (1988), 42 U.S.C. §§ 3601, 3602, 3604-3608, 3610-3614, 3615-3619, 3631 (1988)).

While these measures were significant, the Rehabilitation Act of 1973 remained the centerpiece of the U.S. disability rights legislation. This Act, however, failed to protect the disabled community in many areas, including private employment, public accommodations, transportation, and state and local activities and services. This prompted Congress to examine the possibility of a more comprehensive legislative package addressing the civil rights of disabled Americans. According to one of the ADA's most vocal proponents, Sen. Lowell Weicker (R-CT), "Despite the myriad of civil rights legislation on the books, people with disabilities remained unprotected in many contexts in which federal laws prohibited other types of discrimination – private employment, public accommodations, transportation, and state and local activities and services."[29]

B. The Birth of the ADA

What is now known as the ADA was first introduced in 1987 by an independent federal agency, the National Council on the Handicapped, which was charged by Congress with reviewing all federal laws and programs that had an impact on individuals with disabilities. In their initial report, *Toward Independence*, the Council offered forty-five legislative recommendations, most of which were aimed at quelling the apparent discrimination from which the disabled community suffered. Many of those same recommendations were placed into the ADA legislation that was first introduced in both houses in 1988.[30] Although the bill evoked strong support in Congress,[31] it was not acted upon because the movement for passage was initiated late in the 100th Congressional Session, and thus, the details could not be ironed out before Congress adjourned.

While Congress's first attempt at a comprehensive disability rights package failed, it tried again during the next year with a revised bill, which was introduced by Sen. Tom Harkin (D-IA) and Rep. Tony Coelho (D-CA).[32] Over the next two years, primarily during eleven public hearings in the House and three public hearings in the Senate, Congress wrangled over a number of the bill's provisions, procedural matters and the legislation's application to Congress.[33] Despite the usual pitfalls and disputes customary for any sweeping legislation, historians of the ADA have noted the relative ease with which the bill was passed.[34] This success was largely a result of the bi-partisan support garnered by the legislation, as well as the vocal support provided by President George Bush. The significant differences that were ironed out by the bill's Conference Committee primarily involved Title I, which, as will be explained in the next section, applies the ADA to places of employment. On the majority of issues, the Conference Committee deferred to the House version, which was more comprehensive and moderate.

For example, like the House version, the Conferees agreed that a covered entity possessed the privilege to fire or refuse to hire a person if the individual posed a direct threat to the health and safety of other individuals in the workplace.[35] According to the Senate version, this defense was available only for employees or applicants with a con-

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29. Weicker, Jr., *supra* note 1, at 389.

30. S. 2345, 100th Cong. (1988); H.R. 4498, 100th Cong. (1988).

31. In addition to the bill's sponsor, Rep. Tony Coelho (D-CA), H.R. 4498 was cosponsored by 33 representatives.

32. S. Res. 933, 101st Cong. (1989); H.R. Res. 2273, 101st Cong. (1989) (enacted).

33. Objections over the ADA's application to Congress did not concern substance, but rather, the fact that the bill might violate the separation of powers as a result of the executive branch's endorsement of legislation which would be binding on Congress.

34. *See e.g.* 1 HENRY H. PERRITT, JR., AMERICANS WITH DISABILITIES ACT HANDBOOK 19 (3d. ed. 1997).

35. *Id.* at 28.

tagious disease.[36] The Conference Committee's final version of the ADA met overwhelming support in both houses. On July 12, the House passed the bill by a vote of 377 to 28.[37] One day later, the Senate showed its support with 91 Senators voting in favor of the ADA.[38]

The purpose of the ADA, according to the legislation's authors, was to provide the approximately forty-three million disabled Americans with full and equal opportunities, access to independent living and economic self-sufficiency.[39] They proposed to do this in part by "invok[ing] the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities."[40]

Curiously, since its passage in 1990, the ADA has elicited enormous controversy in the courts as well as with the American public. Despite Congress' effort to make the legislation more specific than the Rehabilitation Act of 1973, application of certain ADA provisions has been inconsistent at times, in part as a result of the case-by-case interpretations that must be made by the court systems. For example, as in section 504 of the Rehabilitation Act, the ADA definition of disability is broad, and is not supported by a list of conditions that might qualify as a disability. As a result, much discretion has been left to the courts in deciding what constitutes a disability. This has often led to disparate results, in part because of varying factual situations. For example, in *Mobley v. Board of Regents of the University System of Georgia*,[41] the court found that a professor's asthma was not considered a disability on the ground that her capacity to work was not restricted. The court determined that the plaintiff's impairment was not significant enough to constitute an impairment of a "major life activity." However, in *Geuss v. Pfizer, Inc.*,[42] the plaintiff's asthma was considered a significant impairment of a major life activity. The court held that an employee with asthma whose ability to breathe was significantly restricted in condition, manner, and duration as compared to the average person was disabled, regardless of whether his asthma impaired his ability to work.

Although comprehensive in many areas, the ADA could not conceivably address every disability or potential reasonable accommodation. Instead, the ADA offers broad definitions and systematic guidelines with which to approach problems involving discrimination against disabled individuals. This, according to former Attorney General Dick Thornburgh, is consistent with the ADA's principal goals of ensuring physical access and fostering basic opportunities for individuals with disabilities.[43] "The impact of the ADA is not disparate treatment, but broadening and inclusive. The ADA is, if you will, a reawakening,"[44] stated Thornburgh. "[T]he doors of perception must be widened among the broader public community, so that we all recognize the right of people with disabilities to come into mainstream society: to come into a restaurant, the Academy of Music, a movie theater; to ride aboard a SEPTA bus; and to come into – most particularly – the workplace."[45]

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36. *Id.*
37. *See* 136 CONG. REC. H4614, at H4629 (daily ed. July 12, 1990).
38. *See* 136 CONG. REC. S9684 at S9695 (daily ed. July 13, 1990).
39. *See* 42 U.S.C. § 12101(b) (1994).
40. *Id.*
41. Mobley v. Board of Regents of the Univ. Sys. of Ga., 924 F. Supp. 1179 (S.D. Ga. 1996).
42. Geuss v. Pfizer, Inc., 971 F. Supp. 164 (E.D. Pa. 1996).
43. *See* Dick Thornburgh, The Americans With Disabilities Act: What It Means to All Americans, 64 TEMP. L. REV. 375, 376 (1991).
44. *Id.*
45. *Id.*

III. Analysis of the ADA

The ADA is divided into four substantive titles: Title I[46] applies to employment discrimination; Title II[47] relates to state and local governments; Title III[48] applies to private entities offering commercial facilities and providing places of public accommodation; and Title IV[49] relates to telecommunications and common carriers. Perhaps the most important, or at least controversial, part of the ADA is the definitional section that comes before Title I, for it is there that the ADA offers language regarding what constitutes a disability.[50]

A. The Definitional Section

The ADA's definition of disability is broad, adopting a functional approach and providing three areas of coverage. The first section applies to individuals who possess "a physical or mental impairment that substantially limits one or more of the major life activities of such individual . . . ."[51] Similar to section 504 of the Rehabilitation Act, "physical impairment" is defined as "[a]ny physiological disorder or condition, cosmetic disfigurements, or anatomical loss affecting one or more of the following body systems: Neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive;[52] digestive; genitourinary; hemic and lymphatic; skin; and endocrine . . . ."[53]

While the determination of whether an individual has an impairment is somewhat straightforward, the same cannot be said for deciphering whether one's impairment has limited a major life activity. The statute's vague language – on, for example, what constitutes "major" – opens the door to varying interpretations. For example, proof that an individual suffers from an impairment does not conclusively establish that the individual is also disabled, for the plaintiff must also introduce evidence establishing that her impairment substantially limits at least one major life activity.[54]

Another issue that has risen recently to the forefront of legal discourse has been whether mitigating measures ought to be considered in determining whether an impairment substantially limits a major life activity.[55] In 1997, the Tenth Circuit held in *Sutton v. United Air Lines, Inc.*[56] that seeing, a major life activity, is not "substantially limited" when a visual impairment can be corrected with glasses or contact lenses.[57] The decision was controversial in that the court disregarded the Equal Employment Opportunity Commission's Interpretive Guidance on Title I of the ADA, which states that "[t]he existence of an impairment is to be determined without regard to mitigating measures

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46. 42 U.S.C. §§ 12111 – 12117 (1994) [hereinafter Title I].
47. 42 U.S.C. §§ 12131 – 12165 (1994) [hereinafter Title II].
48. 42 U.S.C. §§ 12181 – 12189 (1994) [hereinafter Title III].
49. *See* 47 U.S.C. §§ 225, 711 (1994) [hereinafter Title IV].
50. 42 U.S.C. § 12102 (1994).
51. 42 U.S.C. § 12102(2)(A) (1994).
52. *See* Bragdon v. Abbott, 524 U.S. 624 (1998), for the Supreme Court's most recent interpretation of this provision.
53. 28 C.F.R. § 41.31 (b)(1)(i) (1996).
54. *See* Branch v. City of New Orleans, No. 93-1273, 1994 U.S. Dist. LEXIS 18254 (E.D. La. Dec. 14, 1994).
55. *See* Recent Cases, *Statutory Interpretation – Americans with Disabilities Act*, 111 HARV. L. REV. 2456 (1998) (discussing the Tenth Circuit's interpretation of whether mitigating measures ought to be used in evaluating disability).
56. 130 F.3d. 893 (10th Cir. 1997).
57. *See id.*

such as medicines, or assistive or prosthetic devices."[58] In June 1999, the Supreme Court upheld the Tenth Circuit's decision on the basis that the plaintiffs, who were applicants for jobs as airline pilots, could function identically to individuals without a similar impairment.[59] Thus, the plaintiffs failed to properly allege that they possessed a physical impairment that substantially limited them in any major life activity.[60]

The second section in the ADA's definition of "disability" addresses individuals with a "record of such impairment."[61] This includes a history of an impairment or a misclassification of an impairment.[62] This section has also been extended to cover an individual who at one time was limited to a degree that would satisfy the definition of "currently disabled," even though he or she has recovered from these impairments and would otherwise not qualify as "disabled."[63]

The final section of the ADA's disability definition covers individuals "regarded as having such an impairment."[64] The Seventh Circuit recently covered this aspect of the ADA in depth in *Johnson v. American Chamber of Commerce Publishers.*[65] There, a temporary agency sent Robert Johnson to work as a telemarketer at a local business, Apland & Associates. Soon after, Apland fired Johnson as a result of his mumbling, a problem which was caused by the fact that he was missing eighteen teeth. The district court held that Johnson failed to establish that he had a disability. Judge Easterbrook and the Seventh Circuit, however, remanded the case, noting that while Johnson will have a difficult time contending that mumbling substantially limited one of his major life activities, he did, under § 12102(C), have a disability. "Congress could have written the statute so that the presence of some kind of objectively ascertainable condition serves as a filter,"[66] wrote Judge Easterbrook in the unanimous opinion.

> An objective threshold might help the courts to discard implausible claims without the need for costly discovery. Yet no benefit comes free of cost, and a screening device of this kind is not in the package of rights and obligations Congress enacted. If for no reason whatsoever an employer regards a person as disabled – if, for example, because of a blunder in reading medical records it imputes to him a heart condition he has never had – and takes adverse action, it has violated the statute unless some other portion of the law affords it a defense.[67]

B. Title I

Since its passage in 1990, Title I of the ADA has had a tremendous impact on labor law, preventing "covered entities" from discriminating against a "qualified individual with a disability" in the areas of job application procedures; the hiring, advancement, or discharge of employees; employee compensation; job training; and other terms, conditions, and privileges of employment.[68] To prove that an employer violated Title I of the ADA, the plaintiff must establish that he or she was a qualified individual with a disability and that the covered entity excluded the plaintiff because of the disability or that

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58. Regulations to Implement the Equal Employment Provisions of the Americans With Disabilities Act, 29 C.F.R. pt. 1630, app. § 1630.2 (1997).
59. Sutton v. United Air Lines, Inc., _ U.S. _, 119 S. Ct. 2139, 144 L. Ed. 2d. 450 (1999).
60. *See id.*
61. 42 U.S.C. § 12102(2)(B) (1994).
62. *See* S. REP. NO. 116, 101st Cong., 1st Sess. 2 (1989).
63. *See* Buchanan v. Safeway Stores, No. 97-15133, 1997 U.S. App. LEXIS 36395 (9th Cir. Dec. 12, 1997).
64. 42 U.S.C. § 12102(2)(C) (1994).
65. Johnson v. American Chamber of Commerce Publishers, 108 F.3d 818 (7th Cir. 1997).
66. *Id.* at 819.
67. *Id.*
68. 42 U.S.C. § 12112(a) (1994).

the employer failed to create a reasonable accommodation for the plaintiff's disability.[69] The two queries most often raised by this title are: (1) who ought to be considered a qualified individual and, (2) what does a reasonable accommodation entail.

As to the first question, the ADA attempted to provide an answer in its own definitional section, stating that a qualified individual was one who, although possessing a disability, was able to perform the essential functions of the employment position with or without reasonable accommodation.[70] The Senate Report on the ADA attempted to clarify this provision by noting that "essential functions" were those that were "fundamental and not marginal."[71] The ADA, however, leaves much to the discretion of the employer. According to the legislation's text, "consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential function of the job."[72] This has elicited controversy because courts and employers have clashed as to what are the "essential" features of a job.

As the court in *Heise v. Genuine Parts Co.*[73] pointed out, under the ADA, analysis of who is a "qualified individual" must be performed in conjunction with the concept of reasonable accommodation. In other words, determination as to whether a disabled individual was qualified cannot be made without first considering potential accommodations. According to the ADA, a reasonable accommodation may include:

> making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.[74]

Despite the obligation to make reasonable accommodations for qualified disabled employees, there is a limit to the employer's obligation. The ADA states that a Title I action would not be enforceable against an employer who, in making a reasonable accommodation, would incur "undue hardship," which the ADA defines as, "an action requiring significant difficulty or expense."[75] Other than this flexible definition, though, the ADA provides little guidance as to what constitutes undue hardship. In determining whether a business has incurred an undue hardship, the ADA recommends that courts look at such factors as the nature and cost of the accommodation, the overall financial resources of the employer as well as the facility, and the composition, structure and function of the work force.[76] As a result of the definition's breadth, certain accommodations may impose undue hardship for some employers but not for others. Thus, the court must make undue hardship determinations on a case-by-case basis.

A clear example of undue hardship occurred in *Frank v. American Freight Systems Inc.*[77] The court held that an employer was not required to restructure the job of a truck

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69. 42 U.S.C. § 12111 (1994).
70. 42 U.S.C. § 12111(8) (1994).
71. S. REP. NO. 116, *supra* note 60, at 26.
72. 42 U.S.C. § 12111(8) (1994).
73. Heise v. Genuine Parts Co., 900 F. Supp. 1137 (D. Minn. 1995).
74. 42 U.S.C. § 12111(9) (1994).
75. 42 U.S.C. §12111(10) (1994).
76. *See* Elliot H. Shaller, "Reasonable Accommodation" under the Americans with Disabilities Act – What Does It Mean?, 16 EMPLOYEE RELATIONS L. J. 431 n.4 (1991).
77. Frank v. American Freight Systems Inc., 398 N.W.2d 797 (Iowa 1987).

driver who had a bad back by hiring an additional employee to load and unload all of the goods that were unsafe for the truck driver to handle. Such an accommodation, the court stated, would impose excessive costs on the employer. Similarly, in *Gardner v. Morris*,[78] the court held that the request of the plaintiff, a manic depressive, that his employer increase its medical staff at the employee's worksite in Saudi Arabia and provide an on-site blood testing facility would cause too grave of a financial burden on his employer.

C. Titles II and IV

Title II is targeted at public entities, making it unlawful for them to discriminate against or exclude qualified, disabled individuals from participating in or receiving the benefits of their services, programs, or activities.[79] According to § 12131 of the ADA, public entity means "any State or local government; any department, agency, special purpose district, or other instrumentality of a State or States or local government."[80] Similar to Title I, Title II applies to qualified individuals with disabilities. The definition, however, is tailored to those "who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity."[81]

Title IV applies the ADA to the Federal Communications Commission, requiring them to offer special services to hearing- and speech-impaired individuals to the extent possible and in the most efficient manner.[82] For example, all television public service announcements produced or funded by a federal agency or instrumentality must include closed captioning of the verbal content.[83]

D. Title III

Title III is the most pertinent section of the ADA in terms of the *Martin* case and the law's application to professional sports. Its aim is to ensure that disabled individuals are not discriminated against in their enjoyment of goods, services, or facilities provided by any place of public accommodation owned or operated by a private entity,[84] which the ADA defines as anything other than a public entity.[85] Title III is perhaps the most ambitious section of the ADA, granting rights to disabled customers who would not otherwise have been permitted to participate in many of the central activities of mainstream society. "The purpose behind Title III and its attendant regulations,"[86] according to Henry Perritt, "is to facilitate the removal of physical, organizational, and attitudinal barriers from places of public accommodation and commercial facilities."[87] Title III attempts to clarify what constitutes a "public accommodation" under Title III by providing an illustrative, but not exhaustive list of covered entities. Such entities include: restaurants; stadiums; auditoriums; bakeries; laundromats; museums; parks; schools; gymnasiums and golf courses.[88]

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78. Gardner v. Morris, 752 F.2d 1271 (8th Cir. 1985).
79. 42 U.S.C. § 12132 (1994).
80. 42 U.S.C. § 12131 (1994).
81. *Id.*
82. *See* 47 U.S.C. § 225 (1994).
83. 47 U.S.C. § 611 (1994).
84. 42 U.S.C. § 12182(a) (1994).
85. 42 U.S.C. § 12181(c) (1994).
86. PERRITT, *supra* note 32, at 246.
87. *Id.*
88. *See* 42 U.S.C. § 12181(7) (1994).

Titles I and III are closely linked as they demand many of the same requirements on the covered entity, primarily that "reasonable accommodations" be made and that any eligibility criteria intended to screen out an individual with a disability are eliminated.[89] And, similar to Title I, Title III does not require that any accommodation be made if it were to impose an "undue burden" on the covered entity.[90] For example, covered entities are not obligated to eliminate eligibility criteria if they can prove that such are "necessary for the provision of the goods, services, facilities, privileges, advantages, or accommodations being offered"[91] Furthermore, the ADA states that private entities must make reasonable modifications "unless the entity can demonstrate that making such modifications would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden."[92] Differences over this point fostered the debate between the PGA Tour, Inc. and Casey Martin.

IV. *Martin v. PGA Tour, Inc.*: Applying the ADA to Professional Sports

A. Factual Background

Casey Martin suffers from Klippel-Trenaunay-Weber Syndrome, a rare vascular congenital defect which curtails an individual's blood circulation wherever it strikes (in Martin's case, his right leg). The lack of circulation causes atrophy and bone deterioration in the affected area, and concomitantly, severe pain and discomfort to those who suffer from the disease. In Martin's case, loss of bone stock and the deterioration of the tibia over his lifetime has put Martin at substantial risk of fracturing his leg.

Martin's defect has progressed rapidly as he has gotten older, to the point that it is unsafe for him to walk for any significant period of time without endangering himself. This was a particularly burdensome development for Martin, who, upon his graduation from Stanford University in 1995, attempted to pursue a career as a professional golfer at the highest level of competition – the PGA Tour. The PGA Tour is a non-profit association of professional golfers who travel to different Tour-sponsored events around the world in competition for very large sums of prize money.[93] The PGA Tour sponsors and cosponsors three tours: the regular PGA Tour; the Nike Tour, which is analogous to a minor league; and the Senior PGA Tour for golfers 50 years or older. One can qualify for the PGA Tour in two ways. The first and more sought after method of qualification is to finish amongst the top-125 on the Tour's money list at the end of the season. Doing so ensures a golfer's place on the Tour for the following year. The second way is to finish in the top-25 in the PGA Tour's Qualifying Tournament. This "Q-School" consists of three rounds, with a certain number of participants eliminated after each round.

Playing one's way onto the PGA Tour is the ultimate goal of every aspiring professional golfer. For those with a legitimate opportunity to make the PGA Tour, "failure means wondering if you can continue playing a game you have played your whole life," wrote John Feinstein, a journalist who covered the PGA Tour for one season. "Almost always, they go on, win or lose,"[94] stated Feinstein, "because the alternatives – working

89. 42 U.S.C. § 12182(b)(2) (1994).
90. 42 U.S.C. § 12182(b)(2)(A)(iii) (1994).
91. 42 U.S.C. § 12182(2)(A)(i) (1994).
92. 42 U.S.C. § 12182(2)(A)(iii) (1994).
93. As of Nov. 7, 1999, Tiger Woods, the current PGA Tour money leader, had earned $6.6 million on the Tour. Charles Raulerson, who is currently ranked #125 on the PGA Tour list, and thus eligible for the last automatic spot for next year's tour, has earned $326,893. <http://www.pgatour.com/stats/r_109. html>.
94. JOHN FEINSTEIN, A GOOD WALK SPOILED, XIV (1996).

as a club pro, selling golf equipment, or getting out of golf completely – aren't nearly as attractive. They all want the chance to get to or return to the big [PGA] tour."[95]

Despite his condition, Martin was indeed a member of the small pool of golfers capable of playing his way onto the PGA Tour. After playing on less lucrative minor circuits in 1995 and 1996, Martin's third attempt at making the PGA Tour in 1997 proved more successful. Martin's play during the first two rounds of Q-School was good enough to earn him a spot in the final round. It was at this critical juncture in Martin's career – with a chance at a lifetime ambition in sight – that Martin decided to challenge the PGA Tour's rule of not allowing golfers to use carts during competition. Martin challenged the PGA Tour at this point because the rule was not applied during the first two rounds of qualifying out of concern that requiring the approximately eleven hundred original contestants to have a caddie place was too great an economical and logistical burden on them. Fearing that he would not be able to complete the rounds as a result of his condition, Martin requested the PGA Tour to accommodate his needs by letting him use a cart. After the Tour denied his request, Martin sought and was granted a preliminary injunction allowing him to use a cart during the competition. Although Martin missed the cut for the PGA Tour by two strokes, he did attain playing privileges on the Nike Tour. The Nike Tour is cosponsored by the PGA Tour and applies its rules and regulations. Afterwards, the United States District Court for Oregon, where Martin filed suit, extended the preliminary injunction to include the first two tournaments on the Nike Tour. By qualifying for this tour, Martin forced his ADA-based suit against the PGA Tour to continue. Martin contended that by failing to provide him with a cart, the PGA Tour neglected to make its tournaments accessible to individuals with disabilities, in violation of the ADA. Martin's suit would prove to be a landmark one for it was the first time that a court would respond to the question whether the ADA applied to professional sports fields.

B. *Martin I*: Response to Summary Judgment

In responding to Martin's motion for summary judgment, the PGA Tour challenged Martin's allegation that the no-cart rule violated the ADA on the premise that because it was a non-profit establishment with a small membership, it was a "private club" and thus, exempt from the ADA. Citing the Seventh Circuit's decision in *Welsh v. Boy Scouts of America*,[96] United Sates Magistrate Judge Thomas Coffin rejected this argument, holding that the small membership of the PGA Tour has little to do with whether it is subject to the ADA. In *Welsh* the court stated, "Certainly Congress did not intend to condition the private club exclusion from Title II on the popularity of the organization. The more pertinent factor regarding selectivity is the nexus between the organization's purpose and its membership requirements."[97]

For Coffin, determining whether an establishment ought to be conferred private status depends on how it fares with respect to the application of seven factors laid out by the court in *United States v. Lansdowne Swim Club*.[98] They are: genuine selectivity; membership control; history of organization; use of facilities by nonmembers; club's purpose; whether the club advertises for members; and whether the club is nonprofit. Coffin's conclusion that the PGA Tour was not a private club centered primarily around the notion that although it considers itself a non-profit association, the PGA Tour exists mainly for mercantile purposes. Its principal purpose, the Court noted, is to further the

95. *Id.*
96. Welsh v. Boy Scouts of America, 993 F.2d 1267 (7th Cir. 1993).
97. *Id.* at 1277.
98. United States v. Lansdowne Swim Club, 713 F. Supp. 785 (E.D. Pa. 1989).

commercial interests of its members, which include not only the touring professional golfers, but other PGA Tour participants such as the vendors, reporters, and score keepers. Coffin supported this holding by citing *Quijano v. University Federal Credit Union.*[99] There, the Fifth Circuit held that, "Credit unions, however useful they may be, exist for purely mercantile purposes and although they may be organized on a non-profit basis, members join credit unions in search of profits on their investments."[100]

Coffin also rejected the Tour's argument that because its members are selected through competition at qualifying tournaments, the PGA Tour ought to be considered a private entity. Coffin contended that the "genuine selectivity" factor was designed "to protect freedom of association values at the core of the private club exemption."[101] This factor was intended to protect clubs that intentionally screened out members based upon social, moral, spiritual, or philosophical beliefs. It was not designed to confer private status on associations like professional sports leagues that accept participants based on extremely rigorous selection processes. "Such natural 'weeding-out' selectivity is inherent to athletics, and does nothing to confer 'privacy' to the organizations to which professionals matriculate."[102]

Magistrate Coffin also struck down the PGA Tour's second defense to Martin's motion for summary judgment, which was that the courses the Tour operates are not open to the general public and thus, not "places of public accommodation." In other words, the Tour argued that while the areas "outside the ropes" are open to the public and thus, subject to the ADA, different rules ought to apply to competitors who are "inside the ropes." Coffin attacked this line of reasoning based on a strict interpretation of § 121181(7) in the ADA, which specifically includes golf courses as places to which the term "public accommodation" would apply. Coffin rejected the Tour's proposal that entities could have zones of ADA-application.[103] The private club exemption, according to Coffin, could not be manipulated. "[T]he statute and regulations do not support the concept that places of public accommodation have zones of ADA application,"[104] stated Coffin. Entities should not be permitted to "relegate the ADA to hopscotch areas."[105]

More so than most decisions on motions for summary judgment, the outcome of *Martin I* had a profound effect on national policy, for, in holding as he did, Magistrate Coffin increased the scope of the ADA's reach. For better or worse, Coffin rejected a flexible reading of the ADA, and thus, ensured that no places of public accommodation, even professional sports fields, would be excused from the ADA's impact. Coffin indicated in the closing paragraphs of his decision that this opinion was based on his desire to protect not just the athletes on the field of competition, but the support staff who are within the boundary lines of play. Coffin queried the situation in which a golfer decided to hire a disabled caddy: "Once the caddy steps within the boundaries of the playing area of the golf course – a statutorily defined place of public accommodation – does he step outside the boundaries of the ADA simply because the public at large cannot join him there?"[106] Coffin's vehement attacks on the position of the PGA Tour were a good indication that he was inclined to strike down the PGA Tour's no-golf-cart-rule, a conclusion he ultimately announced in the final decision, *Martin II.*

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99. Quijano v. University Federal Credit Union, 617 F.2d 129 (5th Cir. 1980).
100. *Id.* at 133.
101. Martin v. PGA Tour, 984 F. Supp. 1320, 1325.
102. *Id.*
103. *See id.* at 1326, 27.
104. *Id.* at 1326.
105. *Id.* at 1327.
106. *Id.*

C. *Martin II*: Final Judgment

After concluding that the PGA Tour would be subject to the ADA, the central issue to resolve at trial was whether Martin's request for use of a golf cart was a reasonable modification. The Tour's argument was based on their interpretation of the broad ADA language regarding "undue hardship." As described earlier, private entities operating places of public accommodation are not obligated to make modifications that would "fundamentally alter the nature"[107] of the material provided. Consistent with this line of reasoning, the Tour argued that walking was a significant part of tournament golf, and that providing Martin with a cart would alter the nature of the professional sport in a material way. According to PGA Tour Commissioner Tim Finchem, tournament golf is far different from the rules of recreational golf, which do allow the use of carts. "And so it is that there is a difference in a number of areas between what faces the 370 players who play at the championship tournament at the professional level and what everybody else plays at,"[108] said Finchem at a February 2, 1998 press conference. "[W]hen you change the rule for one player in an athletic sport, you are inherently changing the landscape of that sport,"[109] Finchem added. "Could we envision in any sport different rules for different players? If there is anything fundamental about athletic sport it is that you have the same rules for all the competitors. You bring your physical attributes and I bring my physical attributes to the playing field or the oval track or the ski slope or the football field or the baseball field, and we play by the same set of rules."[110] In other words, Finchem and the Tour contended that walking from shot to shot during rounds of tournament play was a "substantive" rule whose repeal would disrupt the purpose and the goals of professional golf.

Citing the general "Rules of Golf" as well as examples of other competitive golf tournaments such as the National Collegiate Athletic Association and other PGA Tour-sponsored events like the Senior PGA Tour and the preliminary rounds of the Q-School, which do permit the use of golf carts, Coffin held that walking was not a fundamental element of PGA Tour play, and that providing Martin with a cart would have little impact on the sport of professional golf. Coffin rejected the Tour's position that the walking rule has been observed during Tour play in order to inject the element of fatigue into the skill of shotmaking, citing evidence that few calories are actually expended by golfers during the five hours it usually takes to complete the Tour-certified courses. Furthermore, Coffin argued that because most professional golfers prefer to walk a course rather than ride in a cart, Martin is actually competing at a disadvantage. "As plaintiff easily endures greater fatigue even with a cart than his able-bodied competitors do by walking, it does not fundamentally alter the nature of the PGA Tour's game to accommodate him with a cart."[111]

Behind the Tour's argument was the premise that the Tour itself was the only entity that could make the rules of golf, that all of its rules are fundamental in nature and that any modification would be material. Magistrate Coffin rejected this notion in siding with Martin's position that the use of a cart would be a reasonable modification of PGA Tour rules. In deciding this way, for the first time in the ADA's history a court had expanded the reach of the ADA to professional sporting fields. "[T]he ADA does not distinguish between sports organizations and other entities when it comes to applying the

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107. 42 U.S.C. § 12182(2)(A)(iii) (1994).

108. Tim Finchem, Remarks at Press Conference (Feb. 2, 1998) <http://ww3.sportsline.com/u/golf/martin/finchem2298.html>.

109. *Id.*

110. *Id.*

111. Martin v. PGA Tour, 994 F. Supp. 1242, 1252.

ADA to a specific situation,"[112] stated Coffin in his opinion. "[T]he disabled have just as much interest in being free from discrimination in the athletic world as they do in other aspects of everyday life. The key questions are the same: does the ADA apply, and may a reasonable modification be made to accommodate a disabled individual?"[113]

Due to extensive media coverage of the decision, which seemed to spin the case as a classic David versus Goliath showdown,[114] the public's reaction was divisive. Regardless of one's perception of the outcome, for many followers of American jurisprudence, the decision begged further questions, like whether the courts were losing sight of the ADA's purpose and intent. In other words, as the courts continued their practice of expanding the ADA's scope, were they beginning to now drift away from the bill's central premise of providing basic opportunities to disabled Americans, who for years had experienced discrimination at work and in public establishments? And specifically, should the ADA be read in such a way as to protect people who seek a particular career, such as a professional athlete?

V. Why *Martin* Was Wrongly Decided

For good reason, Casey Martin's plight elicited enormous sympathy amongst much of the American public. In an age where so many athletes fail to serve as positive role models for today's youth, Martin's story of his relentless pursuit of a dream seemed a welcome addition to sports page headlines. Nike, for example, made him one of the subjects of its "I Can" and "Anything is Possible" campaigns. In addition, former Senator and Republican Presidential candidate Bob Dole (R - KS) hosted a press conference for Martin in Washington, DC, three weeks prior to Magistrate Coffin's final decision. In light of the attention surrounding Martin's case, from a public relations standpoint, it is easy to question the PGA Tour's decision to not accommodate Martin. "For a sport with a history of racial discrimination and elitist image, it is not only a bad law, but also disastrous marketing,"[115] stated one commentator.

Nevertheless, without considering the appeal of Martin's predicament and the empathy it inherently garners, the Tour's legal position was sound for two reasons. First, Magistrate Coffin misunderstood the nature of the parties involved, and in so doing, misinterpreted the ADA's definition of "public accommodation" in Section 12181(7). Martin was not suing a particular private golf course, which is open to the public. Rather, he sought an injunction against the PGA Tour, a professional sports organization comparable to other sports leagues, which had been defined as private entities by other courts in ADA-based cases. Second, while the issue of whether Martin's request was unreasonable is admittedly controversial, determinations of what constitutes an "essential function" of a job or membership is largely up to the organization or employer. In light of the potential unfair advantage that it would create, the decision of allowing a player to use a cart during a round of golf should be left to the rulemaking body of professional golf. This contention is supported by a number of decisions in Title I cases (or under similar language in the Rehabilitation Act) where courts have determined that an individual should not be protected by the ADA simply because he or she does not meet the requirements of a particular job.[116]

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112. *Id.* at 1246.

113. *Id.*

114. *See e.g.* TOM CUNNEFF, WALK A MILE IN MY SHOES: THE CASEY MARTIN STORY 123 (1998).

115. Marc Conrad, *The Martin Ruling: Why the PGA Tour Lost*, N.Y. L.J., March 13, 1998 at 7.

116. *See* Rodriguez v. Westhab, 833 F. Supp. 425 (S.D.N.Y. 1993) (otherwise qualified individual must meet all of the program's requirements in spite of any handicap); Welsh v. City of Tulsa, Okl., 977 F.2d. 1415 (10th Cir. 1992) (individual with impairment that employer perceives as limiting an individual's ability to perform only one job is not handicapped under statutory prohibition against discrimination on basis of

A. Magistrate Coffin's Failure to Properly Read Section 12181(7)

Magistrate Coffin's conclusion that the PGA Tour is a private entity was primarily based on Title III's specific use of "golf course[s]" as an illustration of a place of public accommodation. While golf courses are indeed places of public accommodation most of the time, their categorization largely depends on the circumstances in which they are used. The intent of Title III of the ADA was to provide basic accommodations to disabled individuals by ensuring that they not be discriminated against in their search for lifestyle opportunities afforded to those devoid of physical impairment. Golf courses are specifically mentioned in Title III because it is undeniable that disabled individuals should be provided with the opportunity to engage in the recreation of their choice, if such would be possible. Therefore, the ADA states that places of public accommodation include, but are not limited to, "a gymnasium, health spa, bowling alley, golf course, or other places of exercise or recreation."[117] The court in *Slaby v. Berkshire*[118] affirmed this interpretation in holding that a private club's attempt at making accommodations for disabled golfers while the course was being remodeled was reasonable as long as "disabled members were not prevented from golfing."[119]

In maintaining that the type of course discussed in *Slaby* is similar to those used by the PGA Tour, Magistrate Coffin misapplied Section 12181(7) to *Martin*. Unlike the plaintiffs in *Slaby*, who brought an action against the operators of a particular public golf course, Martin sought an injunction against the PGA Tour, which is a professional sports organization. Unlike owners of gymnasiums, bowling alleys, and golf courses, the PGA Tour is a membership organization which sponsors events open only to those who are qualified to participate. Other than ensuring that particular courses used by the PGA Tour meet its strict standards and regulations during the event, the Tour cares little about how those courses operate during the rest of the year.

Applying this rationale, Magistrate Coffin failed to pose the central issue in *Martin* properly. Coffin articulated the issue as whether Martin was being denied the opportunity to play golf at a particular course, rather than whether Martin was being discriminated against by the PGA Tour. Had he looked at the latter issue instead of the former, he would have had to conclude that the PGA Tour is a private entity that is not covered under the broad umbrella of the ADA. This contention is supported by three cases involving sports membership organizations.

In *Stoutenborough v. NFL*,[120] individuals with hearing impairments challenged the National Football League's (NFL) "blackout rule," which prohibits live local telecasts of home football games that are not sold out 72 hours prior to game-time. Stoutenborough and the rest of the plaintiffs requested that the NFL offer an auxiliary service so that hearing impaired individuals have equal access to some form of telecommunication of the games. Like Martin, their claims were based on Title III of the ADA. Similar to Martin, the *Stoutenborough* plaintiffs contended that they were denied opportunities – in this case to watch football games – afforded to non-handicapped individuals, and that the "blackout rule" unlawfully and disproportionately discriminated against them because television was the only means to view the football games.[121]

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handicap); Tudyman v. United Airlines, 608 F. Supp. 739 (D.C. Cal. 1984) (inability to obtain a single job because of a real or perceived physical or mental impairment does not render one 'handicapped' within meaning of Rehabilitation Act).

117. 42 U.S.C. 12181(7)(L) (1994).

118. Slaby v. Berkshire, 928 F. Supp. 613 (D. Md. 1996).

119. *Id.* at 615.

120. Stoutenborough v. NFL, 59 F.3d 580 (6th Cir. 1995).

121. *Id.* at 582.

The Sixth Circuit upheld the NFL's motion for summary judgment, holding that the ADA applies only to facilities which affect commerce and are used to accommodate the general public.[122] The court stated that the plaintiffs' claims were against the NFL, not owners of the stadium or venue where NFL games were played.[123] Because the NFL is an affiliation of football clubs, the ADA does not apply to the services it provides. This was an important distinction, the Sixth Circuit noted, because it ultimately determined whether the ADA ought to be applied. Like the NFL, the PGA Tour is not a facility,[124] but rather, an organization whose membership is comprised primarily of professional athletes. Applying the Sixth Circuit's rationale in *Stoutenborough*, it follows that the PGA Tour should not be subject to the ADA.

Opponents of this line of reasoning may argue that *Stoutenborough* has no impact on *Martin* because the plaintiffs in the latter case were never denied admission to a facility. In other words, their attempt to engage in a particular activity at a place of public accommodation, like a golf course, was never thwarted. Martin accused the PGA Tour, and not a particular private club, of discrimination. Had Casey Martin's attempt to use a cart during a round of play at his country club's course been denied because of a "no cart" rule similar to that of the PGA Tour's, he would have had a legitimate, and likely fool-proof, ADA claim. Martin, however, was never denied admission to a particular golf course. Rather, he was denied an opportunity to participate in events sponsored by the PGA Tour in a way that would be most advantageous to him.

This contention is supported by *Elitt v. USA Hockey*,[125] which involved a youth hockey player who suffered from attention deficit disorder. The Creve Coeur Hockey Club, which is sponsored by U.S.A. Hockey, denied requests by the Elitts that their son be able to play in a younger age bracket and alongside his father or brother on the ice because of the safety risks involved as well as the disruptive atmosphere it would create for other players. The Elitts felt, however, that due to the similarity between hockey rinks and other places of recreation listed in § 12187 of Title III of the ADA, the defendants were covered by the ADA.

However, for reasons similar to those espoused by the Sixth Circuit in *Stoutenborough*, the district court of Minnesota held that because U.S.A. Hockey did not fall under the provisions of Title III, the court did not have subject matter jurisdiction. In his opinion, District Judge Richard Webber explained that Title III did not apply to the Elitts' claim because the Elitts allege denial of participation in the youth hockey league instead of denial of access to a place of public accommodation, i.e. the ice rink. In order for the Elitts to have an actionable claim, they must show that defendants Creve Coeur Hockey and U.S.A. Hockey fit within the definition of places of public accommodation.[126]

In light of the Sixth Circuit's opinion in *Stoutenborough*, as well as the Seventh Circuit's decision in *Welsh v. Boy Scouts of America*,[127] Webber stated that this would be a

122. *See* 28 C.F.R. § 36.104 (1996) (a "place" is "a facility, operated by a private entity, whose operations affect commerce and fall within at least one of" the public accommodation categories.)

123. Stoutenborough, 59 F.3d at 583.

124. A "facility," according to 28 C.F.R. § 36.104 (1996), is defined as "all or any portion of buildings, structures, sites, complexes, equipment, rolling stock or other conveyances, roads, walks, passageways, parking lots, or other real or personal property, including the site where the building, property, structure, or equipment is located."

125. Elitt v. USA Hockey, 922 F. Supp. 217 (E.D. Mo. 1996).

126. *Id.* at 223

127. Welsh v. Boy Scouts of America, 993 F.2d 1267, 1270 (7th Cir.), *cert. denied*, 510 U.S. 1012 (1993).

fruitless venture because "[c]ourts have generally excluded membership organizations from the definition of public accommodation based on a plain reading of Title II."[128]

The Elitts' request is similar to the one made by Martin. Both parties were pursuing an action against an organization that sponsors athletic events and tournaments, not the entity that actually owned or operated the facility in question. The claims were not aimed at persuading a particular facility to make modifications as was the focus in *Slaby*, but rather, at influencing an organization to modify its rules so that a disabled individual could participate. While Webber correctly focused on the organization in question, U.S.A. Hockey, Coffin was swayed by the activity Martin hoped to conduct and the venue in which he hoped to pursue it. As the divisive outcomes in *Elitt* and *Martin* exemplify, how one analyzes the parties involved, as well as the accommodation they seek, ultimately determines whether one believes the ADA applies or not.

Finally, in the case perhaps most similar to *Martin*, *Brown v. Tenet ParaAmerica*,[129] the court found that Title III of the ADA did not apply to organizers of a bicycle competition for the same reason espoused by the Sixth Circuit in *Stoutenborough* and the district court in *Elitt:* associations, organizing groups or the competition itself do not fall within any of the twelve categories of public accommodations listed in Title III of the ADA. Factually, *Martin* and *Brown* are quite similar in that both involved a disabled competitor who possessed the requisite skills to enter a particular competition sponsored by the umbrella organization. Brown, who rides a specially designed tricycle, was prevented from participating in the cross-country bicycle tour sponsored by Tenet ParaAmerica because he refused to wear a helmet. Brown sued Tenet ParaAmerica based on Title III because he sought what he perceived was a reasonable accommodation. While all riders were required to wear a particular helmet, Brown's special bicycle prevented it from fitting properly. Brown claimed that he was discriminated against by the organization because he could not wear the helmet due to its design in addition to the nature of his disability. Like Martin, Brown was a disabled individual who sought an accommodation from an organizing entity. After all, he contended, if § 12181 was framed to protect disabled individuals in their pursuit of performing such activities as playing golf, working out at a gymnasium, or bowling, should it not also protect disabled individuals who seek to participate in a bicycle competition?[130]

District Court Judge Elaine Bucklo answered in the negative, stating "[t]he present defendants consist of an association, an organizing group, and the ParaAmerica challenge itself."[131] Thus,

> [t]he defendants are closer in identity to a youth hockey or professional football league, which have not been found to be public accommodations, in that they are umbrella groups that organized an event. Mr. Brown does not allege that he was denied access to a physical place. He alleges that he was denied a chance to participate in the ParaAmerica. That allegation does not meet the definition of public accommodation.[132]

Bucklo's holding captures the essential point missed by Coffin in his opinion. Martin was not denied access to a facility like a golf course or driving range. Rather, he was denied an opportunity to participate in a series of sporting events due to his disability, under the authority of a set of rules that are and have been consistently applied by the umbrella organization, the PGA Tour. Thus, instead of following the lead of other fed-

128. *Elitt*, 922 F. Supp. at 223.
129. Brown v. Tenet ParaAmerica, 959 F. Supp. 496 (N.D. Ill. 1997).
130. *Id.* at 498.
131. *Id.* at 498, 99.
132. *Id.* at 499.

eral judges who have ruled on the matter, Coffin set a dangerous precedent that has contributed to distorting the ADA's original intent of helping handicapped individuals pursue basic opportunities which had been denied to them for years.

B. Magistrate Coffin's Failure to Give Deference to the PGA Tour

While the ADA does not expressly state that deference ought to be given to the criterion established by professional or membership organizations, explanatory language external to the four corners of the statute does. This is best exemplified by the guidelines to Title I provided by the Equal Employment Opportunity Commission (EEOC), which state that the courts ought to give much discretion to employers when inquiring as to what constitutes an "essential function" of a job.[133] Although this interpretation applies to Title I claims, it is also relevant to Title III claims like the one at the heart of *Martin.* Courts have frequently looked to these guidelines to help them decide what constitutes an "essential function" of a job. As mentioned in Section III of this Note, if an employee who is disabled cannot meet the "essential functions" of the particular job in question, he or she is not a qualified employee, and thus barred from making an ADA claim. As one can imagine, this framework is likely to stir discussion as to what are the essential functions of the job. If the disabled employee fails to meet what is deemed an unessential function of the job, but can meet other requirements of the job, the ADA claim stands. This inquiry is similar to those in Title III claims where the focus is on whether a disabled individual sought an "unreasonable accommodation" which would impose "undue hardship" on the organization. The inquiry is similar because inevitably Title III claims involve an analysis of the manner in which the modifications will alter the most fundamental elements of the organization.

The inquiry regarding determinations of "essential functions," states the EEOC, ought to focus not on why such decisions were made, but rather, whether those standards were applied consistently. The EEOC explains,

> if a hotel requires its service workers to thoroughly clean 16 rooms per day, it will not have to explain why it requires thorough cleaning, or why it chose a 16 room rather than a 10 room requirement. However, if an employer does require accurate 75 word per minute typing or the thorough cleaning of 16 rooms, it will have to show that it actually imposes such requirements on its employees in fact, and not simply on paper.[134]

Some deference, in other words, must be given to the employer, the membership organization, or professional body. As they are the alleged experts in a particular field, they know what standards ought to be applied for the successful completion of an event or job. As explained in Section III of this Note, the ADA was designed to prevent discrimination against disabled individuals. It was not intended as a means to question the quality of particular rules and standards. As specified by the EEOC, ADA-based inquiries are aimed at ensuring that an organization's rules and standards are applied consistently and for a legitimate and nondiscriminatory reason. Such deference, as required by the ADA, has been offered by courts in the ADA-based cases involving athletic associations or sports programs that had established participation standards.

In *McPherson v. Michigan High School Athletic Association* (MHSAA),[135] the court agreed with the rationale behind the MHSAA's eight semester rule, which provides that any student who has completed eight semesters of high school is ineligible for inter-

133. Appendix to 29 C.F.R. app. § 1630.2(n) (1998).
134. *Id.*
135. McPherson v. MHSAA, 119 F.3d 453 (6th Cir. 1997).

scholastic sports competition. The Sixth Circuit held that the rule is necessary and reasonable, and that requiring the MHSAA to waive the rule would be overly burdensome. McPherson actually took its lead from an earlier case in the same district and involving the same defendant, *Sandison v. Michigan High School Athletic Association.*[136] There the court contended that alterations of competitive athletic programs must not be taken lightly. Instead, any changes must be examined closely, especially in light of the expertise of the governing body. "Removing the age restriction injects into competition students older than the vast majority of other students, and the record shows that the older students are generally more physically mature than younger students,"[137] stated the *Sandison* court.

Similarly, in *Pottgen v. The Missouri State High School. Activities Association* (MSHSAA),[138] the court held that a waiver of the MSHSAA age limit would be an unreasonable accommodation. The MSHSAA, according to the court, maintained a rational basis for its conclusion that red-shirting[139] high school students would often result in a competitive advantage. "Waiving an essential eligibility standard would constitute a fundamental alteration in the nature of the baseball program. Other than waiving the age limit, no matter, method, or means is available which would permit Pottgen to satisfy the age limit. Consequently, no reasonable accommodations exist."[140]

The same deference traditionally provided to high school athletic organizations has also been given to college programs. In one of the only ADA-based cases involving college sports, *Pahulu v. University of Kansas,* [141] Alani Pahulu sued the University of Kansas for its decision barring him from playing on the football team. Pahulu, a scholarship member of the football team, injured his spinal chord during a scrimmage. Pahulu was diagnosed by the doctors as being at great risk of suffering irreparable harm to his neck and spine if he were injured again. The district court upheld the University of Kansas' decision to disqualify Pahulu from continuing to play on the football squad. Pahulu filed an ADA claim contending that he was being barred from participating in a major life activity - his ability to participate in sports. While concurring with the argument that sports can be considered a major life activity, the court maintained that it would uphold the University of Kansas' decision because it passed a "rationality test" that had been embraced by other courts. In other words, stated the court, "the conclusion of the KU physicians, although conservative, is reasonable and rational. Thus, the defendants' decision regarding disqualification has a rationale and reasonable basis and is supported by substantial competent evidence for which the court is unwilling to substitute its judgment."[142]

Applying the recent case law regarding ADA sports-based claims, as well as the EEOC's interpretation of Title I, it is evident that Magistrate Coffin erred in his analysis of the PGA Tour's denial of Martin's request to use a golf cart. From the guidance offered in applicable case law as well as the language of Titles I and III, analysis of what constitutes an unreasonable accommodation consists of two steps. First, similar to the analysis undertaken in Title I claims, a court reviewing a Title III case is first obligated to determine whether a certain rule has been consistently applied. This is necessary because, as described in Section III, the purpose of the ADA is to ensure that there will

136. Sandison v. MHSAA, 64 F.3d 1026 (6th Cir. 1995).
137. *Id.* at 1035.
138. Pottgen v. MSHSAA, 40 F.3d 926 (8th Cir. 1994).
139. "Red-shirting" is a term used in athletics and refers to holding a student back from advancing to the next academic level so that he or she can mature physically or mentally.
140. *Id.* at 930.
141. Pahulu v. Univ. of Kan., 897 F. Supp. 1387 (D. Kan. 1995).
142. *Id.* at 1393-1394.

never again be any discrimination against disabled citizens. Magistrate Coffin, however, failed to consider this essential aspect of the analysis. Rather, his decision centered on listing ways in which the PGA Tour could accommodate Casey Martin. Had Magistrate Coffin examined this aspect of the inquiry, he would have found that the PGA Tour has been eminently consistent in applying its policy of not allowing golf carts in Tour-sponsored events. PGA Tour veterans such as two-time Masters Champion, Jose Maria Olazabal (who has been plagued by foot injuries) as well as Lonnie Nielson (who had to retire from the PGA Tour as a result of an arthritis affliction) and Paul Asinger (who was debilitated by cancer), would have clearly used a cart for Tour events had such an option been present. Nevertheless, similar to athletes in other sports who experience injuries, these, along with numerous other professional golfers, had to stand on the sidelines until their wounds healed. Furthermore, the PGA Tour had denied the use of a cart each time this request had been made by competitors. In 1987, for example, Lee Elder was denied the use of a cart after he suffered a mild heart attack.

The Martin camp argued that his case is distinguishable from that of Olazabal's or Nielson's because he ultimately will never recuperate from his injuries. This line of reasoning, however, fails to consider the importance that leagues and sports organizations place in ensuring that no competitor is provided with an unfair advantage. One of the best explanations for why American spectators are passionate about athletic events is that they are some of the few things that have outcomes that are not only definitive, but also eminently fair despite their imperfections.

Magistrate Coffin thus erred in a second way by brushing aside the PGA Tour's reasoning for its decision. Had Coffin given the PGA Tour the deference other sports organizations in recent ADA cases had been provided, the outcome in *Martin* would have been completely different.[143] For example, the PGA Tour would have clearly passed *Pahulu's* "rationality" test, for while the Tour's walking requirement is debatable, it does have a sound basis. If not, Magistrate Coffin would not have had to cite expert testimony regarding the limited affect of fatigue in athletic competition.[144] Coffin, for example, largely based his decision on the analysis of physiologist Dr. Gary Klug, who testified that "the fatigue factor injected into the game of golf by walking the course cannot be deemed significant under normal circumstances."[145] Klug went on to further argue that fatigue is actually relative to the situation in which it occurs: "Place an individual in the middle of the Los Angeles freeway at rush hour, and he will get fatigued in a hurry without moving a muscle. If someone pedals a bicycle for 30 minutes and says 'I've had it,' but is promised $1,000 if he goes another 5 minutes, his fatigue may well disappear."[146]

Juxtaposed with the PGA Tour Commissioner's statement on the rationale for the organization's walking rule, it is easy to question just which viewpoint was the more reasonable one. More importantly, it is easy to question why deference should have been given to the experts, as it had been in *Sandison, McPherson, Pottgen*, and *Pahulu*:

> When you change the rule for one player in an athletic sport, you are inherently changing the landscape of that sport. Could we envision in any other sport different rules for different players? If there is anything fundamental about athletic sport it is that you have the same rules for all the competitors. You bring your physical attributes and I bring my physical attributes to the playing field or the oval track. . . . PGA

143. *See* W. Kent Davis, *Why is the PGA Tour Teed Off at Casey Martin? An Example of How the Americans with Disabilities Act (ADA) Has Changed Sports Law*, 9 MARQ. SPORTS L. J. 1 (1998).

144. *See Martin*, 994 F. Supp. at 1250.

145. *Id.*

146. *Id.* at 1251.

> Tour players are athletes competing at the very highest level of the sport. Physical fitness is an important part of our sport. Play 36 holes in the heat of the Ryder Cup Competition or walk up to the 17th hole at Castle Pines in the Colorado mountains on a Sunday afternoon . . . and then tell me that physical conditioning and the ability to overcome fatigue aren't part of the competitive sport.[147]

VI. Why *Martin* Has Contributed to the Distortion of the ADA

It is undeniable that Casey Martin's story of overcoming adversity is a positive one. Unfortunately, Magistrate Coffin's holdings in *Martin* have helped water down the intent of the ADA, which was to ensure that disabled Americans receive basic opportunities. While pursuing golf as recreation or as a profession is a right that ought to be guaranteed to all citizens, playing on the PGA Tour is not. Rather, it is a privilege that ought to be granted only to those who meet *all* of the necessary qualifications.

In rejecting the PGA Tour's assertion that the requirement of walking was a substantive rule of its competition and that a waiver would, accordingly, result in a fundamental alteration of PGA Tour events, Magistrate Coffin essentially held that he, rather than a panel of experts, understood what was necessary for a fair PGA Tour competition. By relaxing the requirement for one participant, Coffin opened the door to future claims by athletes who feel restricted by their physical or mental limitations. Most recently, Ford Olinger, a golf pro from Warsaw, Indiana challenged the United States Golf Association's (USGA) rule on not allowing the use of golf carts during play at the U.S. Open golf Championship. Olinger, who suffers from bilateral avascular necrosis (the same injury which terminated the athletic careers of many professional athletes, including Bo Jackson), is unable to walk an 18-hole course because of the pain caused by his disorder. In May 1999, Olinger brought suit against the USGA, which is the unofficial governing body for local golf pros throughout the United States and sponsor of the U.S. Open. Olinger made nearly identical claims as Martin, citing protection under Title III of the ADA. Olinger contended that the USGA is a private entity that is a public accommodation or, at least one that owns, leases, or operates a place of public accommodation. Like Martin, Olinger maintained that the USGA ought to accommodate his disability by allowing him to use a golf cart during competition at the U.S. Open.

U.S. District Court Judge Robert L. Miller, Jr., surprised the legal and sports communities by siding with the USGA.[148] Miller held that ordering the USGA to disregard its "no-cart rule" would fundamentally alter the competition of the U.S. Open. Miller argued that the USGA has a set of specific rules aimed at leveling the playing field for all competitors. Forcing the USGA to sway from its stance would be unreasonable. "The U.S. Open never has used rules or discretionary decisions for the purposes of giving one competitor a systemic advantage over another," stated Judge Miller in his May 20, 1999 opinion.

> All competitors play by the same rules; they hit from the same tees; they are bound by the same limits concerning the number of clubs they may carry; none may switch to a different type of ball during a round. To require that someone be given the discretion to allow one competitor a potential advantage denied to others would fundamentally alter the nature of the competition.[149]

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147. Tim Finchem, Remarks at Press Conference (visited Feb. 2, 1998) <http.//ww3.sportsline.com/u/golf/martin/finchem2298.html>.

148. Olinger v. United States Golf Association, No. 3:98-CV-252RM, 1999 U.S. Dist. LEXIS 9869 (N.D. Ind. May 20, 1999).

149. *Id.* at *31.

Martin is also being cited by parties contending that they have been mistreated by other organizations and their inflexible rules. This point was perhaps best illustrated in *Jacobsen v. Tillmann*,[150] where a woman suffering from dyslexia filed suit against the Minnesota Board of Teaching in order to be certified as a math teacher. Jacobsen's quest to teach math to children was thwarted by the Board because she failed the competency test fourteen times in spite of the Board's generous accommodations, such as providing her with a "reader," as well as additional time to complete the examination. Jacobsen asked the district court of Minnesota to direct the Board to use another standard to consider her qualification to teach. Jacobsen analogized her case with Martin's, contending that just as Martin was denied a reasonable accommodation, so too was she.[151]

District court Judge James Rosenbaum, however, rejected this comparison, arguing that while Martin had demonstrated the requisite skills to compete on the PGA Tour, Jacobsen had not been able to adequately convey her ability to teach math to youngsters. "Martin did not ask to be relieved of the need to demonstrate an ability to execute his middle iron prowess, or to be relieved of the need to putt," the district court stated.

> The objective ability to perform and demonstrate math skills is an inherent part of a teacher's duties. Unlike Martin, the plaintiff has been granted all of the recognized accommodations that are available, and she is still unable to perform. The plaintiff is not asking for an accommodation, she is asking to be relieved of the need to demonstrate an essential and inherent element of competence in the field for which she seeks to practice.[152]

Although *Jacobsen* clearly pushes *Martin* to the extreme, cases like it raise concern about just how far the scope of the ADA ought to reach. In articulating the weaknesses of Jacobsen's position, Judge Rosenbaum noted that the plaintiff's case was more similar:

> to a law school graduate who cannot pass the bar examination, or a medical school graduate who cannot pass the 'boards.' The person may be able to perform the task – whether or not they can pass the examination. But, again, the state which publicly validates the professional's competence by awarding its license, is entitled to demand and receive an objective demonstration of competence in the particular field of endeavor.[153]

Nonetheless, such respect to competency boards, which Judge Rosenbaum deems intrinsic to ensuring solid professionals, was not provided in *Bartlett v. New York State Board of Law Examiners*.[154] There, the Southern District of New York held that Marilyn Bartlett, an aspiring lawyer who suffers from a learning disability that hinders her ability to read, had not been granted enough accommodations during her five prior attempts at passing the bar examination. At issue in this case was whether the Board should be required to provide further accommodations, including twice the allotted time, the use of a computer, large print, and permission to circle multiple-choice questions in the booklet. The Board argued that reading and comprehending material at a relatively quick pace was necessary for being a good lawyer. They also maintained, on the recommendation of learning disability experts, that Bartlett in fact needed no accommodations because her impairment was so minimal as to warrant no special attention. The New York Dis-

150. Jacobsen v. Tillmann, No. 97-CV-1541, 1998 U.S. Dist. LEXIS 13689 (D. Minn. Aug. 31, 1998).
151. *Id.* at *1.
152. *Id.* at *18.
153. *Id.* at *19.
154. Bartlett v. Board of Examiners, 970 F. Supp. 1094 (S.D. N.Y., 1997).

trict Court, however, did not concur. Judge Sonia Sotomayer instead contended that some consideration ought to be made for Bartlett, especially in light of the hard work that she had endured at the University of Vermont Law School. Bartlett "struggled through laborious years of law school – at no small fiscal or psychic cost,"[155] stated Judge Sotomayer. "To tell her now that she is free to go and practice another profession, or to return to her prior field of education, would not be consistent with the remedial goals that Congress intended in passing the ADA."[156]

The Court's decision in *Bartlett* was, however, non-sensical in its application of the ADA. Instead of leveling the playing field – as the ADA intends – decisions like the one in *Bartlett* distort the competition so that people who would otherwise be unqualified for particular professions, are allowed to participate. According to social commentator John Leo, "The traits that used to disqualify candidates – inability to carry out crucial tasks – are now legally positioned as advantages or as conditions that call for various forms of help."[157] This observation seems applicable to both *Bartlett* and *Martin,* where the plaintiffs sued in order to be exempt from particular standards that help define the profession.

VII. Conclusion

It is politically unfashionable to criticize Casey Martin's case against the PGA Tour. Nevertheless, despite the courage Martin has exhibited throughout his professional career, the PGA Tour was correct in rejecting his request to use a golf cart during Tour events. Casey Martin used the Americans with Disabilities Act as a means of gaining access to a career as a professional golfer. His was a tough case. He proved that he could drive, chip, and putt as well as other players on the Tour. He failed, however, in meeting a task for years required of all Tour professionals – the ability to walk the course.

As in the case of an aspiring football player, like Alani Pahulu of the University of Kansas, a paraplegic bicycle racer, or a youth hockey player, the benefit of providing a disabled athlete with an opportunity to compete has to be weighed against the cost of altering the landscape of the game or athletic event in which he or she wants to participate. In deciding to grant this request, the governing body would be forced to change certain rules in order to accommodate the disabled individual, usually at the expense of the other participants. In the cases of *Pahulu, Brown,* and *Elitt,* the courts abandoned whatever emotional response the plaintiffs' plights likely engendered, in order to uphold the law the plaintiffs were seeking to change.

To the detriment of Title III organizations everywhere, Magistrate Coffin failed to follow the lead of other courts that were forced to confront similar problems. Instead, Coffin misapplied the ADA in order to render the more politically correct decision. Had Martin, hypothetically, filed a complaint against a private golf course which had denied him access, his case would have been sound. Martin, however, sued the PGA Tour, a non-physical entity that, like the National Football League and other professional athletic organizations, is not covered under the ADA.

What impact the *Martin* decision will have on the judicial landscape is still largely unclear. There are indications, however, that it has helped foster a sentiment within society that becoming a professional is a right to those who work hard, rather than a privilege offered to those who possess all of the necessary qualifications. If this is the path on which ADA jurisprudence will continue, the meaning of Dr. Henry Viscardi's insightful

155. *Id.* at 1124.
156. *Id.*
157. John Leo, *Let's Lower the Bar,* U.S. NEWS & WORLD REPORT, Oct. 5, 1998, at 19.

comment which introduced this Note, will be forsaken and, to the detriment of the disabled, the ADA will be used as a tool by those seeking a dole rather than an opportunity.

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